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NO. _____

IN THE
Supreme Court of the United States
APRIL TERM, 1984

UNITED STATES OF AMERICA,
Respondent

v.

THOMAS W. TEUTSCH,
Defendant

ALLEGHENY MUTUAL CASUALTY COMPANY,
Petitioner

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

C. ANTHONY FRILLOUX, JR.
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Houston, Texas 77002

Attorney for Petitioner

QUESTIONS PRESENTED

1. Whether the Court of Appeals erred in holding that the failure of the District Court to hold a hearing, when none had been requested, before entering a judgment of forfeiture when the District Court itself had scheduled and subsequently cancelled such a hearing prior to rendering its judgment.

2. Whether the Court of Appeals erred in failing to hold that Rule 46(e)(4) of the Federal Rules of Criminal Procedure requires a post-judgment hearing on the question of remission when such a hearing has been requested by the Surety involved.

PARTIES TO THE PROCEEDINGS

All parties are listed in the caption.

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ALLEGHENY MUTUAL CASUALTY COMPANY prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit which upheld the Order of the United States District Court for the Western District of Texas which denied Surety's Motion to Set Aside Forfeiture of Bail.

OPINIONS BELOW

The District Court's Order denying Surety's Motion to Set Aside Judgment of Forfeiture of Bail (Appendix A)

was filed on June 24, 1983. The Opinion of the Court of Appeals affirming the Order of the District Court was filed on January 20, 1984 (Appendix B). Surety's Petition for a Rehearing was denied on February 16, 1984 (Appendix C).

JURISDICTION

The Judgment of the Court of Appeals was entered on January 20, 1984 (Appendix B), and the Order Denying Rehearing was entered on February 16, 1984. The Jurisdiction of the Court is conferred by 28 U.S.C. § 1254(1).

STATUTES AND RULES IN THE CASE

The Statutes and Rules in this case are Rule 46(e) of the Federal Rules of Criminal Procedure and all its subsections as set out herewith:

Rule 46(e) Forfeiture

(1) Declaration. If there is a breach of condition of a bond, the district court shall declare a forfeiture of the bail.

(2) Setting Aside. The court may direct that a forfeiture be set aside, upon such conditions as the court may impose, if it appears that justice does not require the enforcement of the forfeiture.

(3) Enforcement. When a forfeiture has not been set aside, the court shall on motion enter a judgment of default and execution may issue thereon. By entering into a bond the obligors submit to the jurisdiction of the district court and irrevocably appoint the clerk of the court as their agent upon

whom any papers affecting their liability may be served. Their liability may be enforced on motion without the necessity of an independent action. The motion and such notice as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the obligors to their last known addresses.

(4) Remission. After entry of such judgment, the Court may remit it in whole or in part under the conditions applying to the setting aside of forfeiture in paragraph (2) of this subdivision.

**STATEMENT OF THE CASE WITH FACTS
RELEVANT TO ISSUES ON REVIEW
BEFORE THE COURT**

Petitioner, ALLEGHENY MUTUAL CASUALTY COMPANY, was surety on the appearance bond on which THOMAS WILLIAM TEUTSCH was principal. The amount of the bond was \$50,000.00.

On June 1, 1982, an order was issued by the District Court for the Western District of Texas for the Defendant, TEUTSCH, to show cause why his bond should not be revoked. On June 7, 1982, said bond was revoked in accordance with Rule 46(e)(1). On the same day, Defendant's attorney of record filed a "Memorandum to the Court Concerning the Disappearance of the Defendant, Thomas William Teutsch," with attached letters of said defendant, which Memorandum was orally sealed by the Court and which was not thereafter made a part of the record of this matter.

On July 8, 1982, the government filed a Motion for Judgment of Forfeiture of Bail which was subsequently

set for hearing on September 11, 1982. The court having set the hearing, any request by Surety for a like hearing would have been redundant.

On September 2, 1982, the Court struck the hearing the court itself had set for September 7, 1982. Surety was advised that he would be informed of any new setting.

On October 4, 1982, without further hearing, the court granted the Motion for Judgment of Forfeiture of Bail. Surety had no notice of any hearing in regard to the granting or denying of the government's motion.

On December 6, 1982, in accordance with Rule 46 (e)(4), Surety filed a Motion to Set Aside Judgment of Forfeiture.

On April 4, 1983, Surety's Motion to Set Aside Judgment of Forfeiture was denied without hearing.

REASONS FOR GRANTING THE WRIT OF CERTIORARI

The opinions below raise constitutional questions on the matters of due process and notice not previously addressed in the specific context of this case so far as is known to the Petitioner.

Issue One: The Court of Appeals decision focuses on Rule 46(e)(2) of the Federal Rules of Criminal Procedure which states that the court may set aside a forfeiture if justice does not require the enforcement thereof. This focus excludes the clear provisions of Rule 46(e)(4) for the remission of a forfeiture *after the judgment thereof has been entered*. That is, the Rule provides both for pre-judgment and post-judgment action by the court.

There are, therefore, two points in the proceedings under Rule 46(e) when hearings on the matter of setting aside a forfeiture would be appropriate.

It is clear on the record that the court itself set a hearing of the type appropriate to action under Rule 46(e)(2). A request by Surety for a like hearing would, at the time, have been redundant. The implication of the Appellate decision is that Surety would have a right to a hearing under Rule 46(e)(2) had it requested one. It is difficult to understand why Surety was deprived of that right merely because the District Court saw fit to cancel the hearing the Court itself had set, and thereafter held out to Surety the indication that said hearing would be rescheduled. The District Court in effect misled the Surety by its action, and the Surety should not be held to pay for such, without further hearing.

Issue Two: The Court of Appeals held that:

Allegheny's contention that it was entitled to a hearing will not be considered. "In the absence of exceptional circumstances where a miscarriage of justice would result . . . questions that were not presented to or passed on by the trial court will not be considered by the court." *D. H. Overmyer v. Loftin*, 440 F.2d 1213, 1215 (5th Cir. 1971).

The basis of the appeal to the Fifth Circuit was the denial by the trial court of the hearing requested by the Surety to which he is clearly entitled under the plain language of Rule 46(e)(4) which provides for remission "After entry of such judgment [or forfeiture made in accordance with Rule 46(e)(3)]."

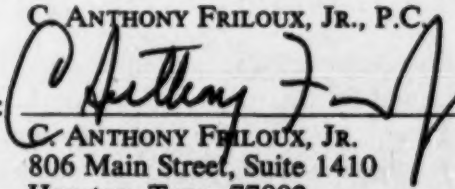
Surety, Allegheny, Petitioner herein, duly applied for a hearing under Rule 46(e)(4). By reason of the fact that the trial court denied that request, such matter, the right to a hearing under Rule 46(e)(4), to follow the holding of the Appeals Court ruling, was not presented to nor passed on by the court.

There seems, therefore, to be no way for Petitioner herein to assert the right to the hearing clearly allowed under the Rules for Criminal Procedure, if the ruling of the Appeals Court is allowed to stand.

Because it is the clear intent of Rule 46(e)(4) that if requested there be a post judgment hearing to determine the issue of remission, the Appeals Court erred in its opinion and did thereby deprive the Surety, Petitioner herein, of his rights to whatever portion of the bail the trial court might have remitted after a proper hearing, and thus denied the Surety due process under the Fifth and Fourteenth Amendments.

For the reasons set forth herein, Petitioner requests that a Writ of Certiorari issue.

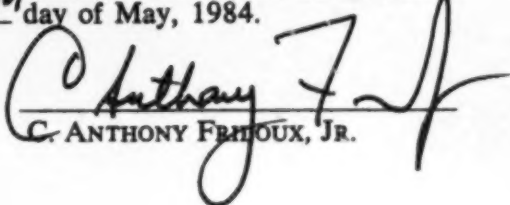
Respectfully submitted,

By: 
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Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that copies of the above have, according to the rules of this Court, been served on the opposing counsel by placing said copies in the United States mails addressed to the Solicitor General of the United States, Justice Department, Washington, D.C.

Said copies were delivered to the United States Postal Service on the 14th day of May, 1984.


C. ANTHONY FRITOUX, JR.

APPENDIX A

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

CRIMINAL NO. A-81-CR-112(2)

UNITED STATES OF AMERICA

v.

THOMAS WILLIAM TEUTSCH

(Filed April 6, 1983)

ORDER

Came on for consideration by the Court this day Defendant's Surety's Motion To Set Aside Judgment For Forfeiture Of Bail. The Court having carefully considered Defendant's Surety's Motion together with the arguments in support thereof and the Government's response thereto, in light of Rule 46(e)(3), Federal Rules of Criminal Procedure, which requires no independent action for enforcement of a judicially declared forfeiture such as this, is of the view and finds that it is without merit and should be **DENIED**.

IT IS THEREFORE ORDERED that Defendant's Surety's Motion To Set Aside Judgment For Forfeiture Of Bail is hereby in all things **DENIED**.

SIGNED and ENTERED this 6th day of April, 1983.

/s/ JAMES R. NOWLIN
James R. Nowlin
United States District Judge

APPENDIX B

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 83-1385

Summary Calendar

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS WILLIAM TEUTSCH,
Defendant.

ALLEGHENY MUTUAL CASUALTY COMPANY,
Appellant.

Appeal from the United States District Court
for the Western District of Texas

(JANUARY 20, 1984)

Before GEE, POLITZ and JOHNSON, Circuit Judges.

PER CURIAM:

Allegheny Mutual Casualty Company appeals the district court's denial of its motion to set aside a bond forfeiture. Finding neither error nor abuse of discretion, we affirm.

Thomas William Teutsch was indicted for participating in a RICO narcotics conspiracy. The court set the appearance bond at \$250,000 and accepted a \$200,000 ten percent cash bond signed by Teutsch together with a \$50,000 surety bond posted by Allegheny.

Teutsch failed to appear. The magistrate revoked Teutsch's bond and issued an arrest warrant. Teutsch remains a fugitive. After Teutsch failed to appear for trial the government moved for forfeiture of bail. By order dated August 31, 1982, the court declared the bail forfeited. Simultaneously the court ordered service of the motion for forfeiture on the clerk of court who was directed to notify defendants by mail, as prescribed by Fed. R. Crim. P. 46(e)(3). The order further directed Teutsch and Allegheny to respond within twenty days. Allegheny received notice by certified mail on September 4, 1982, but made no filings. On October 4, 1982, the court rendered judgment against Teutsch for \$200,000 and against Allegheny for \$50,000.

On December 6, 1982 Allegheny filed a Motion to Set Aside Judgment for Forfeiture of Bail. The court rejected this motion on April 6, 1983, and Allegheny noticed its appeal.

Allegheny contends that the district court erred in failing to hold a hearing so that it could present its defenses to forfeiture. Allegheny also contends that the forfeiture judgment was improperly entered because the court had previously revoked the bond, thus relieving it of any liability. Allegheny concedes that abuse of discretion is the applicable standard of appellate review. *Wilson v. Thompson*, 638 F.2d 801 (5th Cir. 1981).

The controlling provision is Fed. R. Crim. P. 46(e)(2) which empowers the court to set aside a bond forfeiture "if it appears that justice does not require the enforcement of the forfeiture." The party challenging the forfeiture bears the burden of demonstrating that the district court clearly abused, *United States v. Roher*, 706 F.2d 725 (5th Cir. 1983), its "wide discretion," *United States v. Gil*, 657 F.2d 712, 714 (5th Cir. 1981).

Allegheny has failed to demonstrate a substantive abuse of discretion in the court's refusal to set aside the bond forfeiture. The failure to conduct a hearing where none was requested before entering a judgment of forfeiture in this case is not sufficient. And Allegheny's suggestion that the forfeiture should be set aside because the bond revocation terminated its responsibility is without merit. Allegheny signed an appearance bond. It would be an anomaly nigh onto absurdity to excuse the surety because the principal breached a condition of the bond by failing to appear as ordered. The defendant's failure to appear is the very trigger of the surety's obligation.

Allegheny's contention that it was entitled to a hearing to seek a remission will not be considered. "In the absence of exceptional circumstances where a miscarriage of justice would result . . . questions that were not presented to or passed on by the trial court will not be considered on appeal." *D. H. Overmyer v. Loftin*, 440 F.2d 1213, 1215 (5th Cir. 1971).

We find neither error nor abuse of discretion in the trial court's refusal to set aside the forfeiture.

AFFIRMED.

APPENDIX C

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 83-1385

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

THOMAS WILLIAM TEUTSCH,
Defendant,

ALLEGHENY MUTUAL CASUALTY COMPANY,
Appellant.

Appeal from the United States District Court
for the Western District of Texas

ON PETITION FOR REHEARING

(February 16, 1984)

Before GEE, POLITZ and JOHNSON, Circuit Judges.
PER CURIAM:

IT IS ORDERED that the petition for rehearing filed
in the above entitled and numbered cause be and the
same is hereby denied.

ENTERED FOR THE COURT:

/s/ HENRY A. POLITZ
United States Circuit Judge